

No. 78-394

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

ANGELO COSTANZO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of his conviction for evasion of personal and corporate income taxes on the grounds that there was no proof that corporate income was the source of the unreported income, that the government failed to verify the unreported corporate income by the gross profit percentage method, and that the government did not give him an opportunity to explain certain conduct that appeared to constitute an attempt to mislead the government investigators.

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of evading personal income taxes for 1968-1971 and attempting to evade corporate income taxes owed by Costanzo's Bread, Inc., a corporation owned by petitioner and his wife, for the same years, in violation of 26 U.S.C. 7201. The district court sentenced him to concurrent terms of imprisonment of a year and a day and fines amounting to \$40,000. The court of appeals affirmed (Pet. App. A-1 to A-12).

At trial, the government employed the net worth plus non-deductible expenditures method of proof to establish that petitioner had understated his personal income and that of the corporation for the years in question. In defense, petitioner claimed that the excess unreported income established by the government's net worth computations was attributable to a large cash reserve, kept in safe deposit boxes, which petitioner had accumulated since 1930. However, the government introduced evidence showing that petitioner had admitted to investigators that he was "out of cash" as of December 31, 1967. Moreover, an examination of petitioner's tax returns for 1940-1959 revealed minimal assets and income insufficient to have allowed accumulation of a significant cash hoard. The evidence further showed that neither petitioner nor his wife had ever received any large inheritances or gifts; that, since 1960, petitioner had borrowed funds on eight separate occasions; that petitioner borrowed against his life insurance policy and had placed a chattel mortgage on his business equipment; that during the investigation the safe deposit box in petitioner's wife's name contained only \$37; that petitioner's wife earned only \$3,100 per year as secretary of the corporation; and that petitioner told the investigators that he gave his wife only housekeeping money (Pet. App. A-4 to A-5).

The government also established that Costanzo's Bread, Inc., was a successful business; that the corporation reported nearly half a million dollars in gross sales during 1968-1971; that the corporation received large amounts of cash and that petitioner or his wife recorded the cash receipts; that the receipts and cash register tapes from which the corporation's records were prepared were subsequently destroyed; and that petitioner himself made all of the deposits to the corporate bank account (Pet. App. A-8 to A-9). There was also evidence that petitioner, his wife, and their two sons were observed on

occasion removing cash from the corporation's cash registers, and that they did not restore such withdrawals to the corporation's cash accounts (Tr. 1093-1094).¹

1. Petitioner argues (Pet. 7-10) that the court of appeals' statement that "[g]iven the Government's proof of unreported income and its negation of all possible sources of nontaxable income, proof of a likely source of taxable income was not necessary" was erroneous insofar as it permitted conviction without proof that the source of the unreported income was corporate income. In petitioner's view, the government was required to prove that the unreported income was from his corporation.

To be sure, where, as here, the government seeks to prove evasion of both corporate and personal income taxes of a closely held corporation and its shareholder by showing an increase in the net worth of the shareholder, it must show that corporate income was the source of the increase in the shareholder's net worth. See *United States v. Vassallo*, 50-1 U.S.T.C., par. 9319 (D. Del. 1949), *aff'd*, 181 F. 2d 1006 (3d Cir. 1950); *DiZenzo v. Commissioner*, 348 F. 2d 122 (2d Cir. 1965).² But despite the statement of the court of appeals (Pet. App. A-12) that proof of a likely source of taxable income was not necessary, it is clear in this case that the government proved that the source of the increases in petitioner's net worth was unreported corporate income. Indeed, the court of appeals earlier concluded (Pet. App. A-9) that "[t]he

¹"Tr." references are to the transcript of trial proceedings.

²Once having shown an increase in the shareholder's net worth, the government asks the jury to infer that the increase arose from unreported corporate income and that the corporation understated its taxes. These inferences arise from the facts that the shareholder effectively controlled the corporation, that he diverted corporate gross receipts, that the diverted gross receipts were not recorded on the corporate books, and that it was unlikely that the increase in the shareholder's net worth arose from any other source. See *United States v. Vassallo*, *supra*; *DiZenzo v. Commissioner*, *supra*.

Government's evidence showed * * * that the * * * [corporation] was a likely source of at least a substantial portion of the unreported income charged in the indictment" (footnote omitted). Petitioner does not challenge this finding. Hence, the proof was adequate to sustain the conviction.

2. Petitioner further contends (Pet. 10-13) that the government should have been required to verify that the corporation could have generated the alleged excess income by the gross profit percentage method.³ Although the government is required to prove each element of the offense beyond a reasonable doubt (*In re Winship*, 397 U.S. 358, 364 (1970)), there is no requirement that the government prove each element twice. As the court of appeals correctly concluded (Pet. App. A-9), the government introduced evidence from which the jury could have concluded that the corporation was the source of the unreported income. There was no requirement that the government employ the gross profit percentage method of proof.

3. Finally, petitioner argues (Pet. 13-14) that the government improperly introduced evidence that he had access to his safe deposit box approximately one hour before a scheduled appointment with Internal Revenue Service agents to examine and record the contents of the box. He asserts that this evidence was prejudicial because the government never gave him an opportunity to explain this incident by asking him about it and that he was unable to explain at trial that this visit to his safe deposit box was merely one of some 327 "regular-course-of-business" incidents without taking the stand and waiving

³Gross profit percentage is the ratio of gross profits to gross receipts (Pet. App. A-9 n.4). Under this method, the corporation's gross receipts and gross profits for the years in question could have been calculated from the gross profit percentage for bakeries of similar size and activity and the corporation's cost of materials.

his Fifth Amendment rights. However, petitioner did not raise this objection in the court of appeals, and, at all events, the Fifth Amendment does not shield a criminal defendant from incriminating evidence offered by the prosecution.⁴

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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⁴Petitioner could have offered his explanation to the jury without waiving his Fifth Amendment rights by introducing bank records showing that he frequently visited his safe deposit box and arguing to the jury that the incident in question was part of his regular course of business.